

**WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**SYNOPSIS REPORT**

**Decisions Issued in November 2013**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

**NOTICE:** These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

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**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Absenteeism; Tardiness; Work Schedule; Leave Reporting; Hearsay; Arbitrary and Capricious; Mitigation
<b><u>CASE STYLE:</u></b>	<u>Bennett v. West Virginia School of Osteopathic Medicine</u> DOCKET NO. 2012-1186-WVSOM (11/20/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved that Grievant was dismissed for good cause related to chronic absenteeism.
<b><u>SUMMARY:</u></b>	<p>After numerous written and verbal warnings, an improvement plan and a suspension, Respondent terminated Grievant's employment for chronic tardiness and absenteeism. Grievant asserts that the majority of Respondent's evidence is hearsay and Respondent failed to show good cause for her dismissal. Grievant also alleges that she was subjected to discriminatory treatment and that her actions did not justify dismissal of a long term employee.</p> <p>Respondent proved the charges against Grievant by a preponderance of the evidence, and Grievant was given multiple opportunities to improve her conduct over the course of years of progressive discipline. While Grievant's co-workers were, at times, antagonistic toward her, Grievant did not prove that discrimination played a role in this disciplinary action. The Grievance is DENIED.</p>

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<b><u>KEYWORDS:</u></b>	Insubordination; Medical Leave of Absence; Medical Certification; Return to Work Agreement; Arbitrary and Capricious
<b><u>CASE STYLE:</u></b>	<u>A. v. Marshall University</u>  DOCKET NO. 2013-1720-MU (11/21/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant demonstrated that Respondent acted arbitrarily and capriciously when it terminated her employment for failing to provide medical certification of her ability to resume her teaching duties.
<b><u>SUMMARY:</u></b>	Grievant was terminated from her position as a tenured Professor in Marshall University's Lewis College of Business based upon her failure to present medical certification of her ability to resume her teaching duties following the expiration of an approved Medical Leave of Absence, as provided in a Return to Work Agreement which Grievant signed nine months earlier. Although Grievant demonstrated that she made efforts to comply with the terms of the Return to Work Agreement, the nature of her medical conditions effectively prevented her from attaining compliance. Thus, Grievant's actions were not "willful" to support a charge of insubordination. Nonetheless, MU's determination that Grievant should be terminated after having taken leaves of absence extending for more than 18 months was not unreasonable, nor arbitrary and capricious, and was permissible in the circumstances presented.

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<b><u>KEYWORDS:</u></b>	Timeliness; Statutory Time Lines; Extracurricular Assignments; Excuse to Timely Filing; Ignorance of the Law
<b><u>CASE STYLE:</u></b>	<u>Morris v. Harrison County Board of Education</u>  DOCKET NO. 2013-0672-CONS (11/21/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant demonstrated an excuse for his failure to timely file his grievances.
<b><u>SUMMARY:</u></b>	Grievant was asked several years ago to work outside in the mornings before school, basically as a crossing guard, and the Principal of the school at that time agreed to let Grievant leave work early if he did so, and Grievant agreed. This was not an extracurricular assignment that was posted and filled, nor was it a paid assignment. Grievant could have quit working this duty at any time, and was not entitled to be returned to this duty at any time. When a new Principal was assigned to Grievant's school, she eventually declined to allow Grievant to leave early. She also assigned him to work a second lunch duty without pay. Grievant did not work either the early morning bus duty or the second lunch duty after February 27, 2012, but failed to file a grievance until June 22, 2012. Grievant's stated excuse to this untimely filing was that he did not know how to file a grievance. Ignorance of the grievance procedure is not a valid excuse to untimely filing.

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<b><u>KEYWORDS:</u></b>	Insubordination; Willful Neglect of Duty; Lack of Supervision; Fire Drill
<b><u>CASE STYLE:</u></b>	<u>Moore v. Brooke County Board of Education</u>  DOCKET NO. 2012-0741-BroED(R) (11/27/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved Grievant was insubordinate or willfully neglected his duty by leaving a classroom of high school juniors unattended for less than five minutes.
<b><u>SUMMARY:</u></b>	Grievant was suspended for three days for insubordination and willful neglect of duty. Respondent proved by a preponderance of the evidence that Grievant failed to supervise his classroom following a fire drill. As a result of lack of supervision, three students engaged in the use of synthetic marijuana in the classroom after the fire drill. Respondent met its burden of proof and established the charges that led to the discipline of Grievant.

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**SERVICE PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Dismissal; Relief; Advisory Opinion
<b><u>CASE STYLE:</u></b>	<u>Baker v. Wayne County Board of Education</u> DOCKET NO. 2013-1721-WayED (11/21/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether there is relief that can be granted through the Grievance procedure.
<b><u>SUMMARY:</u></b>	Grievant sustained a work-related injury in December 2010, after tripping on wires lying in the floor at the Respondent's central office. As a result, Grievant received workers' compensation benefits for medical treatment and expenses. After a co-worker was injured in a similar fashion two years later, Grievant filed this grievance alleging discrimination, favoritism, and that Respondent deliberately subjected her to harm. As her only relief, Grievant is seeking reimbursement for a medical bill incurred for treatment she received as a result of her compensable injury and "reevaluation of previous claim for compensation." The relief Grievant seeks is wholly unavailable to her through the grievance process, and a decision on the merits of her claim would only result in an advisory opinion. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, DISMISSED.

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<b><u>KEYWORDS:</u></b>	Willful Neglect of Duty; Unsupervised Students; Leaving Bus Running; Safety Violation; Mitigation
<b><u>CASE STYLE:</u></b>	<u>Walls v. Monongalia County Board of Education</u> DOCKET NO. 2013-1682-MonED (11/22/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant's actions constituted willful neglect of duty and whether the penalty imposed was clearly excessive or disproportionate to the offense.
<b><u>SUMMARY:</u></b>	Grievant was suspended for two days without pay when he exited the bus to speak with a school principal about a disciplinary issue, and left the bus running with unsupervised students on board. Grievant was aware he was not to leave the bus running with students on board who were not supervised if he exited the bus. Grievant's reasons for not turning the bus off before exiting were that it was cold outside and he needed to continue on his evening route as quickly as possible. Grievant's actions constitute willful neglect of duty. Grievant did not demonstrate that the discipline imposed was clearly excessive or disproportionate to the offense.

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**KEYWORDS:** Overtime; Work Hours; Schedule Changes; Arbitrary pr Capricious

**CASE STYLE:** Nestor v. Kanawha County Board of Education  
DOCKET NO. 2013-0622-KanED (11/15/2013)

**PRIMARY ISSUES:** Whether the Board abused its discretion or acted in an arbitrary and capricious manner when it made reasonable modifications to Grievant's schedule as an aide assigned to assist a special education student.

**SUMMARY:** Respondent altered the work schedule of Grievant, a special education aide, to be more in sync with the arrival and departure time of her assigned special needs student. Grievant contends this was a violation of West Virginia Code § 18A-4-8a(i), in that her work schedule was altered during the school year without her written consent to avoid payment of overtime wages. Respondent maintains its action was a prudent and permissible exercise of its authority. Respondent notes the alteration in Grievant's daily work schedule was minimal and reflective of the arrival and departure of the special education student she assisted. Respondent further notes Grievant's actions were in violation of applicable agency overtime rules and regulations.

Notwithstanding the language in W. Va. Code § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule within the parameters of the employee's contract. A service employee is not empowered with the ability to sua sponte enlarge his or her work day schedule to include overtime on a regular and continuous basis. In the circumstance of this matter, Respondent acted within recognized authority when it made modifications to Grievant's schedule as an Aide assigned to assist a special education student. Accordingly this grievance is DENIED.

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**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Demotion; Abuse; Injury; Falsifying Report; Mitigation; Arbitrary; Capricious
<b><u>CASE STYLE:</u></b>	<u>Higgins v. Division of Corrections/St. Mary's Correctional Center</u> DOCKET NO. 2012-0352-MAPS (11/21/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether demotion was improper discipline or otherwise warranting mitigation.
<b><u>SUMMARY:</u></b>	Grievant was demoted from his position as a Correctional Officer V to that of a Correctional Officer II for various policy violations all resulting from an incident that occurred on June 17, 2011. Grievant denies many of Respondent's claims, and argues that his demotion was improper, excessive, arbitrary and capricious. Respondent demonstrated that Grievant's conduct violated its policies and procedures, and that the demotion was appropriate. Grievant failed to prove that his demotion was arbitrary and capricious, clearly excessive, or an abuse of discretion. Further, Grievant failed to offer sufficient evidence in support of mitigating his demotion. Therefore, this grievance is DENIED.

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<b><u>KEYWORDS:</u></b>	Suspension Pending Investigation; Failed to Substantiate Allegations; Back Pay; Moot
<b><u>CASE STYLE:</u></b>	<u>Clonch v. Department of Health and Human Resources/Lakin Hospital</u> DOCKET NO. 2014-0316-DHHR (11/20/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant's suspension being expunged, and her pay and benefits restored, renders this grievance moot.
<b><u>SUMMARY:</u></b>	Grievant filed this grievance disputing her suspension pending investigation by Respondent. Since the filing of the grievance, the investigation failed to substantiate the allegations against Grievant. This suspension was expunged and Grievant's pay and benefits were restored. As there is no continuing controversy between the parties or any further relief that can be granted, this matter is now moot. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, dismissed.

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**KEYWORDS:** Falsification of Client Contacts; Phone Reviews; Hearsay; Failure to Call Witnesses; Written Statements; Proof

**CASE STYLE:** Kemper v. Department of Health and Human Resources/Bureau for Children and Families  
DOCKET NO. 2013-1656-CONS (11/4/2013)

**PRIMARY ISSUES:** Whether Respondent proved the charges against Grievant.

**SUMMARY:** Grievant was suspended pending an investigation, and then dismissed from her employment as an Economic Service Worker for falsification of information and encouraging a customer to commit fraud. A client reported to the office receptionist that no one had called him for his scheduled review in January 2013. Grievant's supervisor placed telephone calls to some of the clients assigned to Grievant for reviews, and asked to speak to the clients, whom she did not know. Persons identifying themselves as the clients were asked whether they had been contacted for a case review in January 2013, and these individuals reported that they had not been contacted. Computer entries made by Grievant indicated that these clients had been contacted for a telephone review. Grievant's supervisor did not take written statements from any of the persons she contacted, nor did she take any action to verify that the person she was speaking to was the client, and no other steps were taken to investigate the allegations.<sup>1</sup> None of the clients was called to testify at the level three hearing. One client that had come into the office signed a written statement which was prepared and notarized by employee Tammy Rush, but the statement was not given under oath, and Ms. Rush was not called to testify. The only evidence presented by Respondent to prove the charges was hearsay. Under the circumstances presented here, this hearsay is entitled to no weight. Respondent did not prove the charges against Grievant.



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<b><u>KEYWORDS:</u></b>	Position Description Form; Job Classification; Employee Performance Evaluations; Discretionary Salary Increase; Puccio Memorandum; Alsop Memorandum
<b><u>CASE STYLE:</u></b>	<u>Crossan v. Division of Highways and Division of Personnel</u> DOCKET NO. 2012-0647-DOT (11/1/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant established that her salary is in violation of any mandatory rule, regulation or law.
<b><u>SUMMARY:</u></b>	<p>Grievant seeks generally an increase in her salary. Grievant contends that if Respondent had regularly performed Employee Performance Evaluations, she would have received merit salary increases. Grievant further seeks back pay for the performance of duties averred to be recognized as tasks of a separate and distinct job classification. Grievant contends Respondent has been working her out of classification.</p> <p>During the time period relevant to this grievance, a state-wide moratorium on discretionary salary increases was in place, and such raises were restricted with regard to state employees. The lack of an annual Employee Performance Appraisal had little impact, if any, on Grievant's inability to receive a merit raise in the last seven years. Further, simply because Grievant performs some duties that were previously performed by an employee in another classification does not per se demonstrate unlawful work assignment, nor establish misclassification. Grievant is being paid within the pay range of the pay grade assigned by the Division of Personnel to her classification. Grievant failed to establish she was unlawfully denied discretionary salary adjustments and/or that Respondent(s) are required to grant her an increase in salary.</p>

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**KEYWORDS:** Denied Representation; Voluntary; Resignation; Moot; Rescind; Duress; Coercion

**CASE STYLE:** Willis v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2013-0265-DHHR (11/25/2013)

**PRIMARY ISSUES:** Whether Grievant's resignation was voluntary and whether Respondent was required to allow Grievant to rescind her resignation.

**SUMMARY:** Grievant alleges that she was required to participate in a meeting where discipline was being contemplated and was not allowed to have a representative present. Grievant also alleges that she was not allowed to rescind her resignation which she argues was filed under duress. Grievant voluntarily resigned from her employment and that resignation was accepted, in writing, prior to her requesting that it be rescinded. Additionally, no discipline was contemplated nor issued as a result of the meeting Grievant attended without representation. Consequently, there is no specific remedy available and Grievant's resignation rendered that issue moot. The Grievance is DENIED.

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**KEYWORDS:** Non-Selection; Qualifications; Interview Process; Minimum Requirements; Arbitrary and Capricious

**CASE STYLE:** Perry v. Division of Highways  
DOCKET NO. 2012-0422-DOT (11/26/2013)

**PRIMARY ISSUES:** Whether Grievant proved that the selection for the Crew Supervisor position was an arbitrary and capricious decision.

**SUMMARY:** Grievant failed to meet his burden and demonstrate that Respondent's selection process was flawed. Grievant did not demonstrate that the decision to not select him for the position in question was unlawful or an action that was arbitrary and capricious.

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**KEYWORDS:** Compensable Work Time; Payment for Attendance of a Mediation; Adjusting Grievances; Working Hours; Attending Grievance Proceeding

**CASE STYLE:** Wilt v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital  
DOCKET NO. 2012-0278-DHHR (11/19/2013)

**PRIMARY ISSUES:** Whether Grievant established that she is entitled to compensation for time spent attending a mediation session.

**SUMMARY:** Grievant challenges Respondent's disapproval of her request to be paid for time she spent at a mediation session related to a previous grievance. Grievant maintains that Respondent's former Human Resources Director assured employees that the time they spent at grievance proceedings would always be compensated, regardless of whether or not the proceeding was scheduled during the employees' regular work hours. Respondent's policy makes clear that grievance proceedings scheduled outside the employee's normally scheduled work hours are not compensable work time. No violation of any applicable statute related to scheduling of grievance proceedings was demonstrated. In addition, Grievant suffered no loss of pay to attend her mediation session. Accordingly, this grievance is denied.

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**KEYWORDS:** Reprisal; Retaliation; Work Schedule; Relief

**CASE STYLE:** Matney v. Department of Health and Human Resources/Welch Community Hospital  
DOCKET NO. 2012-1099-DHHR (11/12/2013)

**PRIMARY ISSUES:** Whether Grievant established that the reasons given by his employer for changing his work schedule upon his reinstatement after successfully challenging his termination through the grievance procedure were merely a pretext for prohibited retaliation.

**SUMMARY:** Grievant was reinstated to his former position as a Storekeeper 3 by a Grievance Board decision. However, DHHR assigned Grievant to a new 8:00 AM to 4:00 PM shift in place of the 6:30 AM to 2:30 PM shift he had worked for over 20 years prior to his termination. DHHR asserted that this shift change was intended solely to improve agency efficiency. In accordance with the legal standards for analyzing a claim asserting prohibited retaliation under the grievance statute, Grievant established by a preponderance of the evidence that DHHR's justification for the shift adjustment involved a pretext for prohibited retaliation, and DHHR failed to provide the full make-whole remedy ordered by the Grievance Board. Accordingly, Grievant's previous work schedule must be restored.

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<b><u>KEYWORDS:</u></b>	Pay Equity Raise; Classification; Equal Pay Commission; Relief
<b><u>CASE STYLE:</u></b>	<u>White, et al. v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel</u> DOCKET NO. 2013-0703-CONS (11/7/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether this matter is excluded from the grievance process as the authority to act to provide pay equity pay increases was vested in the Equal Pay Commission, who is not Grievants' employer.
<b><u>SUMMARY:</u></b>	Grievants did not receive a pay equity pay increase that was approved by the Equal Pay Commission for other employees holding the same classifications as Grievants. Although the Division of Personnel made recommendations to the Equal Pay Commission regarding the pay increases, only the Equal Pay Commission had the authority to act on the pay increases. Matters in which the authority to act is not vested with a grievant's employer are specifically outside of the Grievance Board's authority. Accordingly, Respondent's Motion to Dismiss should be granted, and this grievance, dismissed.

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<b><u>KEYWORDS:</u></b>	Job Assignments; Policy; Reprisal; Retaliation
<b><u>CASE STYLE:</u></b>	<u>Cobb v. Division of Highways</u> DOCKET NO. 2013-0866-CONS (11/7/2013)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved Respondent was guilty of reprisal in giving her an undesirable assignment.
<b><u>SUMMARY:</u></b>	Grievant argues that she was given the least desirable assignments on a road paving and repair job in reprisal for making a sex discrimination complaint and filing a grievance. Grievant failed to prove that her assignment to the least desirable duty on the job resulted from retaliatory motives.

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**KEYWORDS:** Hostile Work Environment; Discrimination; Favoritism; Reprisal

**CASE STYLE:** Cross v. Division of Rehabilitation Services  
DOCKET NO. 2012-0214-DEA (11/13/2013)

**PRIMARY ISSUES:** Whether Grievant demonstrated she was subjected to harassment or a hostile work environment.

**SUMMARY:** Grievant alleges workplace harassment, retaliation, and a hostile work environment concerning her employment in the Sistersville Branch Office of the Division of Rehabilitation Services. Grievant also makes a claim of favoritism in regard to treatment by Respondent toward a fellow employee. The record did not establish Grievant's claim of a hostile work environment. In addition, Grievant did not prove that she was the victim of reprisal, favoritism, or harassment. This grievance is denied.